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HONG YIK PLASTICS (M) SDN BHD v. HO SHEN LEE (M) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
SURAYA OTHMAN JCA
B HAS ZANAH MEHAT JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1790-09-2018]
11 NOVEMBER 2019

C ***CIVIL PROCEDURE:*** *Trial – Unfair judicial treatment – Allegation of – Whether plaintiff accorded fair trial – Whether trial judge consistently interrupted and interjected during examination of witnesses – Whether trial judge pre-judged case – Whether trial judge transgressed core principle that judge remain neutral during proceedings – Whether criticisms of trial judge constituted sufficient ground for reversal of judgment – Whether warranted appellate intervention – Whether new*
D *trial before another judge ought to be ordered*

At the High Court, the appellant ('plaintiff') filed an action against the respondent ('defendant') for infringement of the plaintiff's patent. The plaintiff sought a declaration, injunctive orders, account, damages to be assessed, aggravated damages and exemplary damages. In response, the
E defendant counterclaimed for a revocation of the patent and a declaration of non-infringement. After a full trial, the trial judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. Hence, the plaintiff appealed. Having had the benefit of perusing the appeal record, the written judgment of the High Court and the comprehensive written submissions of
F both parties, this court invited the plaintiff and the defendant to address on the first issue relating to unfair judicial treatment. The plaintiff submitted that the plaintiff did not have a fair trial and that during the course of the hearing, the trial judge had consistently interrupted and interjected in the examination of the plaintiff's witnesses, PW1 and PW2. The trial judge had also made it
G clear at the beginning of the hearing that she disbelieved the plaintiff's witnesses and had made unwarranted adverse comments against PW1 and PW2 in the course of their testimonies. The trial judge had also pre-judged the case and as such had descended into the arena when she ought not to have done so. According to the plaintiff, the trial judge had transgressed the core
H principle that a judge remain neutral during the proceedings. In reply, the defendant conceded that the trial judge's conduct was condescending but added that the defendant's witnesses were also chided. However, the defendant averred that the trial judge's remarks did not interfere with the finding of facts and that the trial judge's decision was made on a consideration of the evidence at the hearing and was correct in fact and in law. It was the
I defendant's case that there was therefore no basis for a new trial.

Held (ordering new trial before another judge)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) Under our system of adversarial trials, the only participant impartially seeking the true facts and the applicable law is the trial judge. To achieve his purpose and objective in a just manner and with just results, the trial judge is under a duty to see that justice is done; by rendering to every person his due under the same law, equally, fairly, and impartially applied and administered, without bias, without prejudice, without passion, and irrespective of race, creed, economic or social status. In this connection, the duty of the trial judge extends to the preservation of the rights of litigants and a proper disposition of the matters in dispute. It is also the trial judge's duty to, *inter alia,* protect witnesses from irrelevant, improper or insulting questions. Accordingly, when the parties have finally arrived at trial, they are entitled to, and it is the trial judge's duty, to give to them and to their cause, the calm and deliberate hearing, consideration, and study that the ideal of justice demands. A trial judge must treat lawyers, litigants and witnesses with respect and must refrain from comments that suggest that he had made up his mind in advance. (paras 12 & 13)

(2) A civil proceeding is generally considered fair if the parties had been given the opportunity to be heard, when it is conducted within a reasonable time and in such a manner that parties are given a reasonable opportunity to present their case to the court under conditions which do not place one of them at a substantial disadvantage *vis-à-vis* the other. On a perusal of the excerpts from the notes of proceedings, it was immediately apparent that the trial judge's frequent interventions during the plaintiff's evidence were highly unusual and disconcerting. The trial judge appeared to not only have descended into the arena, cast off the mantle of impartiality and prejudging the issues, but also to have employed language which was intemperate, threatening, overbearing and intimidating. One was left with the impression of a judge who, if not partisan, was openly hostile towards the plaintiff. There were repeated interruptions, demands and criticisms by the trial judge. The plaintiff's complaints have thus been made out. The trial judge did not conduct herself as a neutral umpire at the trial. (paras 15, 17 & 19)

(3) The trial judge had pre-judged the probable failure of the plaintiff's case when she asked the plaintiff's counsel whether the plaintiff wanted to reconsider their case; and when the plaintiff's counsel was slow on the uptake, the trial judge remarked 'You're not with me. Daydreaming …'. When the plaintiff's counsel wanted to say something, the trial judge was also emphatic when she said 'No, I don't want you to reply. I only asked you whether the plaintiff would like to consider or re-consider its case.' Equally cutting were her following remarks 'OK. We're going on and on … I think I'll be very foolish to go on … Whether in light of these

A answers, he wants to reconsider his case.' Such judicial conduct could hardly be equated with the affirmative duty of a trial judge – to be patient, dignified and courteous to litigants, witnesses and counsel. On the totality of the evidence, the trial judge not only seriously transgressed the fundamental principle that she should have remained B neutral during the evidence, but she had also acted in a manner which was, at times, manifestly unfair and hostile to the plaintiff. (paras 21 & 22)

(4) This was not a case of a non-speaking judgment by the trial judge or the absence of any finding of fact on a particular issue; in such instances, an appellate court is duty bound to endeavour to make its own findings of C fact, based on the evidence on the record. This was also not an instance where a new trial may be prejudicial to the parties and an unnecessary inconvenience to the witnesses. This was a case of excessive interventions by the trial judge; which fact added great weight to the substance of the appeal. In these circumstances, the criticism of the trial D judge was of such magnitude as to constitute by itself a sufficient ground for reversal of the judgment. (para 23)

(5) It was necessary to emphasise the importance of the trial judge not to descend into the arena and thereby depriving herself of the ability to take a detached view when forming her conclusion. Justice is best done by E the judge who holds the balance between the contending parties without himself taking part in their disputations. This was an instance where the plaintiff was denied a fair hearing in the sense that he was not accorded his right to be heard by an impartial tribunal. The nature, tenor and frequency of the trial judge's interventions were such that the plaintiff F was denied a fair hearing; thereby warranting the Court of Appeal to exercise its discretion to order a new trial so that the plaintiff could be afforded his day in court and to a fair hearing under substantive and procedural law. (para 24)

Case(s) referred to:

G *Jan Tomasz Serafin v. Grzegorz Malkiewicz & 2 Ors [2019] EWCA Civ 852* ***(refd)***
Yuill v. Yuill [1944] P15 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 71(1), (2)
Federal Constitution, art. 8

H *For the appellant - Nashvinder Singh Gill, Gurdit Singh, Yang Tek Yeh & Melody Woon Sze Mun; M/s Aziz & Co*
For the respondent - Cyndi Chow Li Kian, Jolene Tham & Ong Hui Yi; M/s Josephine, LK Chow & Co

[Editor's note: Appeal from High Court, Shah Alam; Suit No: BA-22NCVC-157-03-2017 I *(ordering new trial).]*

(Editor's note: Please note that this judgment carries with it an appendix which adverts to parts of the notes of evidence in the court below. Considering the voluminous nature of the text, the editors have however decided to only publish the appendix in the electronic report of the case and not in the print journal.)

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] At the High Court, the plaintiff filed an action against the defendant for infringement of the plaintiff's patent. The plaintiff sought a declaration, injunctive orders, account, damages to be assessed, aggravated damages and exemplary damages. In response, the defendant counter-claimed for a revocation of the patent and a declaration of non-infringement. After a full trial, the learned judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. This is the plaintiff's appeal against the decision of the High Court. In this judgment, the parties shall be referred to as they were in the court below.

[2] Having had the benefit of perusing the appeal record, the written judgment of the High Court and the comprehensive written submissions of both parties, we invited learned counsel for the plaintiff and defendant respectively to address us on the first issue relating to unfair judicial treatment. If we found no merit on the first issue, we would then proceed to hear counsel on the remaining issues.

[3] We adopted this course of action because in the event a new trial was ordered, we do not think that it would be proper for this court to rule on the other issues which relate to questions of mixed fact and law. These issues would be for the trial judge at the new trial to rule on.

[4] After hearing of submissions of counsel, we were of the unanimous opinion that the plaintiff's complaint of unfair judicial treatment was made out; and that in the particular circumstances of this case, we were constrained to order a new trial before another judge. Consequently, the order of the High Court was set aside with no order as to costs. We now give our reasons for our decision.

Submissions

[5] Learned counsel for the plaintiff submitted that the plaintiff did not have a fair trial. During the course of the hearing, the trial judge had consistently interrupted and interjected in the examination of the plaintiff's witnesses PW1 and PW2. In particular, the trial judge also made it clear at the beginning of the hearing that she disbelieved the plaintiff's witnesses. The trial judge also made unwarranted adverse comments against PW1 and PW2 in the course of their testimonies given them enormous pressure and fear affecting their ability to testify and making it difficult for the plaintiff to

present its case. The trial judge also pre-judged the case almost at the beginning of the hearing when PW1 was giving his evidence in chief. As such, the trial judge had descended into the arena when she ought not to have done so.

[6] To support his arguments, learned counsel alluded to the notes of proceedings where the trial judge was manifestly unfair and hostile towards the plaintiff's witnesses. As such, the trial judge had transgressed the core principle that a judge remains neutral during the proceedings.

[7] In reply, learned counsel for the defendant conceded that the trial judge's conduct was condescending but added that the defendant's witnesses were also chided. However, the trial judge allowed the evidence to come through the witnesses throughout the five days of hearing. The trial judge's comments in English were directed at the plaintiff's counsel and not at the plaintiff's witnesses who did not understand English. At any rate, the plaintiff's evidence was poor and the plaintiff did not apply for the trial judge to be recused. The plaintiff was not prevented from producing evidence at the hearing. As such, the trial judge's conduct and her remarks did not interfere with the giving of evidence at the hearing. There was no interference with the finding of fact. The trial judge's decision was made on a consideration of the evidence at the hearing and is correct in fact and in law. There is therefore no basis for a new trial.

Decision

[8] Although appeals to the Court of Appeal are by way of re-hearing, the Court of Appeal may on the hearing of an appeal make an order for a new trial. Section 71 of the Courts of Judicature Act 1964 (CJA 1964) empowers the Court of Appeal to order a new trial in two different sets of circumstances. One is where it can be shown that there is improper admission or rejection of evidence at the original trial, the Court of Appeal may only order a new trial if it is satisfied that "some substantial wrong or miscarriage of justice has been thereby occasioned" (sub-s. (2)). The second arises under sub-s. (1) which provides that the Court of Appeal shall have power to order a new trial by the High Court on grounds other than that of improper admission or rejection of evidence. In this appeal, the plaintiff's argument in support for a new trial is founded on unfair judicial treatment and not for improper admission or rejection of evidence; as such, the principles that fall to be considered under sub-s. (2) are not applicable.

Adversarial Legal System

[9] The role of judges differ depending on the legal tradition adopted in a particular country. There are essentially two types of legal traditions governing the nature of adjudication around the world: adversarial and inquisitorial systems. Common law countries like Malaysia use an adversarial system to determine facts in the adjudication process. The adversarial system is based on the opposing parties acting as adversaries who

compete to convince the judge that their version of facts is the most probable. The judge presides over the trial as an impartial referee; in that capacity he rules on disputed issues of procedure and evidence, asking questions of witness when it is necessary to clear up any point that has been overlooked or left obscure; to see that counsel behave themselves seemly and keep the rules laid down by law; and to exclude irrelevancies and discourage repetition. The role of the judge is to hold the balance between the contending parties without himself taking part in their disputations. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts and application of the law accurately. In contrast, the inquisitorial system is associated with civil law systems. It is characterised by extensive pre-trial investigation conducted by an investigating Magistrate as a means of seeking the truth. This means that there is a thorough review of the facts prior to the commencement of a trial.

Right To A Fair Trial

[10] A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in light of the rule of law. The right to a fair trial is also a fundamental right pursuant to art. 8 of the Federal Constitution which provides for equality before the law and equal protection under the law; otherwise described as the principle of equality among citizens. In this connection, the common law has long recognised two minimum fair trial guarantees known as the principle of natural justice: (i) the principle of judicial impartiality (*nemo judex in causa sua*) and (ii) the right to be heard (*audi alteram partem*) (Jackson, P, *Natural Justice* (2nd edn, Sweet & Maxwell, London 1973). The right to a fair trial has also evolved to encompass a right to access to the courts, public hearings and a hearing within a reasonable time.

[11] In both civil and criminal cases, rights exist and are being adjudged. In each the same inherent and constitutional rights exist. In each, the duty of the trial judge is the same. In each, the parties are entitled to justice under law. Concomitant with this is the trial judge's duty to determine and apply the law applicable to the facts found. To the lowest and humblest, to the weak, the poor, and to the strong, the same law applies. To be equally administered by a judge. However, justice does not exist in substantive law alone. Justice in the application of substantive law is dependent on the pre-existent fairness of the procedure; in other words, procedural due process in the trial of the cause. Procedural due process is not only for the parties, but, also, for the court itself. Only thereby can the court maintain its conscience and dignity. Only thereby can it appeal to, and justify the trust and confidence of the public.

[12] Under our system of adversarial trials, the only participant impartially seeking the true facts and the applicable law is the trial judge. To achieve his purpose and objective in a just manner and with just results, the trial judge is under a duty to see that justice is done; by rendering to every person his due under the same law, equally, fairly, and impartially applied and administered, without bias, without prejudice, without passion, and irrespective of race, creed, economic or social status. In this connection, the duty of the trial judge extends to the preservation of the rights of litigants and a proper disposition of the matters in dispute. It is also the trial judge's duty to *inter alia*: protect witnesses from irrelevant, improper or insulting questions; allow them to be detained only so long as the interests of justice require; allow them to be examined only as to matters legal and pertaining to the issue; advise them of their right not to give an answer which will tend to incriminate them or one which will directly tend to degrade their character, unless it be the fact in issue or a fact from which the fact in issue would be presumed.

[13] Accordingly, when the parties have finally arrived at trial, they are entitled to, and it is the trial judge's duty to give to them and to their cause, the calm and deliberate hearing, consideration, and study that the ideal of justice demands. A trial judge must treat lawyers, litigants and witnesses with respect and must refrain from comments that suggest that he has made up his mind in advance.

Principle Of Fairness

[14] At the heart of the right to a fair hearing is the principle of fairness. In the context of unfair judicial treatment, we think that the principle of fairness enunciated by the Court of Appeal in *Jan Tomasz Serafin v. Grzegorz Malkiewicz & 2 Ors* [2019] EWCA Civ 852 paras. 108-112 is apt:

> 108. It is a fundamental tenet of the administration of law that all those who appear before our courts are treated fairly and that judges act – and are seen to act – fairly and impartially throughout a trial.
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> 109. It is perfectly proper – indeed a duty- for a judge to intervene in the course of witness evidence for the purposes described by Rose LJ in *R v. Tuegel* [2002] Cr App R 361, namely, "to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear".
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> 110. It is wrong, however, for a judge "to descend into the arena and give the impression of acting as advocate" (per Lord Parker CJ in *R v. Hamilton* (unreported, 9 June 1969) cited by the Court of Appeal in *R v. Hulusi* (1973) 58 Cr. App. R 378, 382).
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> 111. In *Michel v. The Queen* [2009] UKPC 41, Lord Brown JSC, giving the judgment of the Court, made it clear that the issue whether a trial has been fair was not to be judged merely by the correctness of the result:

27. There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. *Put shortly, there comes a point when,* however obviously guilty an accused person may appear to be, *the appeal court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried:* so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor ...

28. Lord Bingham was, of course, right to recognise that by no means all departures from good practice render a trial unfair. *Ultimately the question is one of degree* ...

31. [N]ot merely is the accused in such a case deprived of "the opportunity of having his evidence considered by the jury in the way that he was entitled". *He is denied too the basic right underlying the adversarial system of trial, whether by jury or jurats: that of having an impartial judge to see fair play in the conduct of the case against him.* Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. *The core principle that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence applies no less to civil litigation than to criminal trials.*

(emphasis added)

112. These principles, of course, apply with equal vigor whether or not litigants are legally represented. Indeed, so far as litigants in person are concerned, judges and tribunals should be (and generally are) especially conscious to ensure the dictates of fairness are observed – and seen to be observed – at all times and that due allowance is always made for language and other difficulties.

[15] It follows from a distillation of the above-cited principles that a civil proceeding is generally considered fair if the parties have been given the opportunity to be heard, when it is conducted within a reasonable time and in such a manner that parties are given a reasonable opportunity to present their case to the court under conditions which do not place one of them at substantial disadvantage *vis-a-vis* the other.

[16] We now turn to the plaintiff's counsel's written submission, and in particular, the excerpts from the notes of proceedings which learned counsel relied on as instances of the trial judge's excessive and unwarranted judicial intervention. For completeness, we attach to this judgment at Annexure "A" these excerpts.

[17] On a perusal of these excerpts, in particular the bold and underlined passages, it was immediately apparent to us that the trial judge's frequent interventions during the plaintiff's evidence (in chief and under cross-examination) were, not to put too fine point on it, highly unusual and disconcerting. On numerous occasions, the trial judge appears not only to have descended into the arena, cast off the mantle of impartiality and prejudging the issues, but also to have employed language which was intemperate, threatening, overbearing and, frankly, intimidating. One is left with the impression of a judge who, if not partisan, was openly hostile towards the plaintiff.

[18] At the hearing of the appeal, we asked learned counsel for the defendant whether she found those passages unusual and troubling. Whilst she candidly conceded that they were, she countered that (i) the defendant's witness also suffered the same treatment, (ii) nevertheless, the trial judge was very pleasant and considerate when she met counsel in her chambers, and (iii) the judge allowed all the evidence to come in.

[19] In the particular circumstances of this case, we are constrained to express our deep concern with the repeated interruptions, demands and criticisms by the trial judge. We are satisfied that the plaintiff's complaints have been made out. The trial judge did not conduct herself as a neutral umpire at the trial.

[20] Apart from these excerpts, learned counsel for the plaintiff also cited from the notes of proceedings when SP1 was under cross-examination.

YA: *And now say I agree. If the corned bead that is something that already been patented. Does the Plaintiff wish to reconsider his case*?

JEL: I'm sorry, Yang Arif?

YA: You're not with me? Day dreaming. In light of all his answer now, we know how it go. His invention, so to speak, is being queried, is being challenged. An inventor should be very able to show the court how he come up with the invention. I recalled that I mention that it took how many years? 6 years, 7 years for the patent office to actually gave him a patent. That is one issue on the side. The other thing is now in court today on a challenge you must no show to me that, 'hey I'm the inventor, from scratch I came up with a feather, with this feather which has a little bit of thing and then it fell into some color then I realised I could write for quite a while with it and from that I try to develop something that can be attached to the tip so that there'll be a continue flow of color so I can write longer and after the second ring blabla and eventually I invented a fountain pen'. Who invented the fountain pen? God knows but as an example I can show steps of the way how I did it and eventually I sent it for patents and no I patented all the fountain pens. Parker, Sheafer, better pay be my patent. So when

challenged somebody says I got it I can show when I started what year how I progress. *Now we come to this plaintiff PW1, he is not showing me anything you know. But the worse thing is that there is a US Patent for the same thing. The corner bead. But the problem with him is that his inability to show for him to explain to us how he went about, doing, making something to be more or otherwise. Cause everything he has depended on the patent agent who is not a witness so there is a very big vacuum there and when we look at him as a witness who requires translation from Mandarin to English and the technicality of-technical nature of pages 3 or 4 right to 17.* Then the question is how much of it is his and how much of it was the patent agent and how much of it was patent through existing documentation on the US Patent. We'll be going into details.

JEL: Yes

YA: *So I'm wondering at this stage in light of his fast answer that yes the corner bead which he gave to the agent to prepare the technical drawings. That corner bead together with his oral instructions forms the so-called invention. And now he says he agrees that the corner bead which he showed to his agent that he draw, draw, draw, draw, draw that obviously I cannot draw anything, similar to the US one. Would you like to consider*?

JEL: Yang Arif, may I just- try something:

YA: No, I don't want you to reply. I only ask you whether the Plaintiff would like to consider or re-consider its case.

JEL: No. I think with regards to the last answer, that is something the witness:

YA: Ok. *We're going on and on and if there is no good change for successful outcome. I think it'll be very foolish to go on.* But I do not want to hear submissions at this stage. I'm merely asking whether maybe you should ask him, you should actually ask him because it is not your case, it is his case. *Whether in light of these answer, he wants to reconsider his case.*

JEL: Yes, Yang Arif. But I would need to consult-

YA: Go towards approach him and talk to him – softly. I cannot keep going up and down. Never mind. You go and talk to him. Talk to him quietly.

[21] It is apparent that the trial judge has pre-judged the probable failure of the plaintiff's case when she asked the plaintiff's counsel whether the plaintiff wanted to reconsider their case; and when the plaintiff's counsel was slow on the uptake, the trial judge remarked "You're not with me? Day dreaming ...". When the plaintiff's counsel wanted to say something the trial judge was also emphatic when she said "No. I don't want you to reply. I only asked you whether the plaintiff would like to consider or re-consider its

A case." Equally cutting were her following remarks "Ok. We're going on and on and if there is no good change (*sic*) for successful outcome I think I'll be very foolish to go on. Whether in light of these answers, he wants to reconsider his case."

B **[22]** We are of the view that such judicial conduct can hardly be equated with the affirmative duty of a trial judge – to be patient, dignified and courteous to litigants, witnesses and counsel. On the totality of the evidence on the record, we are bound to hold that the trial judge not only seriously transgressed the fundamental principle that she should have remained neutral during the evidence, but she also acted in a manner which was, at times, C manifestly unfair and hostile to the plaintiff.

[23] Whilst not all departures from good practice render a trial unfair, in the final analysis, the question is one of degree. This is not a case of a non-speaking judgment by the trial judge or the absence of any finding of fact on a particular issue; in such instances, an appellate court is duty-bound to D endeavor to make its own findings of fact, based on the evidence on the record. This is also not an instance where a new trial may be prejudicial to the parties and an unnecessary inconvenience to the witnesses. This is a case of excessive interventions by the trial judge; which fact adds great weight to the substance of the appeal. In these circumstances, the criticism of the trial E judge is of such magnitude as to constitute by itself a sufficient ground for reversal of the judgment.

[24] We think it necessary to emphasise the importance of the trial judge not to descend into the arena and thereby depriving herself of the ability to take a detached view when forming her conclusion. Indeed, it was Lord F Greene MR who explained that justice is best done by the judge who holds the balance between the contending parties without himself taking part in their disputations (*Yuill v. Yuill* [1944] P15). This is an instance where the plaintiff was denied a fair hearing in the sense that he was not accorded his right to be heard by an impartial tribunal. We have carefully considered and G reflected on this matter and are constrained to hold that the nature, tenor and frequency of the trial judge's interventions were such that the plaintiff was denied a fair hearing; thereby warranting the Court of Appeal exercising its discretion (such discretion which is only exercised save in rare and exceptional circumstances) to order a new trial so that the plaintiff can be H afforded his day in court and to a fair hearing under substantive and procedural law.

[25] For the foregoing reasons, we ordered a new trial before another judge. The order of the High Court was set aside. We also made no order as to costs of this appeal.

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